RECORD AND BRIEFS

Supreme Court, U.S.
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No. 16-1276

IN THE

Supreme Court of the United States

DIGITAL REALTY TRUST, INC.,
PETITIONER,
v.
PAUL SOMERS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

John E. Cuttino
President
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe Street
Chicago, IL 60603
(312) 795-1101
jcuttino@gwblawfirm.com

Matthew T. Nelson
Counsel of Record
Conor B. Dugan
WARNER NORCROSS & JUDD LLP
111 Lyon Street N.W.
900 Fifth Third Center
Grand Rapids, MI 49503
(616) 752-2539
mnelson@wnj.com

Counsel for Amicus Curiae

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BRIEF OF *AMICUS CURIAE* DRI–THE VOICE OF THE DEFENSE BAR IN SUPPORT OF PETITIONER

Amicus curiae, DRI–The Voice of the Defense Bar, respectfully submits that this Court should grant the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.[1]

INTEREST OF THE *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar is an international organization of more than 22,000 attorneys who defend the interests of businesses and individuals in civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of defense attorneys. Because of this commitment, DRI seeks to promote the role of defense attorneys, to address issues germane to defense attorneys and their clients, and to improve the civil justice system. DRI has long participated in the ongoing effort to make the civil justice system more fair, efficient, and—especially where national interests are involved—consistent.

To promote these objectives, DRI participates as *amicus curiae* in cases that raise issues important to

[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus curiae* and its counsel made a monetary contribution to the preparation or submission of this brief. All parties have been timely notified of the filing of this brief, and all parties have filed blanket letters of consent with the Clerk's Office.

its members, their clients, and the judicial system. See, e.g., *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338 (2011); *University of Texas S.W. Med. Center* v. *Nassar*, 133 S. Ct. 2517 (2013). This is just such a case. Petitioner's issue implicates each of DRI's core concerns. The circuit split creates inconsistency in how federal law affords protection to whistleblowers, an area of significant importance to DRI's members and their clients. The interpretation of a statutorily defined term to mean something else implicates the fairness of the civil justice system by reducing the predictability of judicial results based on the text of statutory law. And the expansion of Dodd-Frank's anti-retaliation provision moots the streamlined administrative dispute-resolution process for claims of retaliation for reporting suspected securities-law violations in the Sarbanes-Oxley Act, undercutting the efficiencies Congress intended.

By construing the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010's whistleblower-protection provision, 15 U.S.C. § 78u–6, to apply to employees who make reports other than to the Securities and Exchange Commission, the Ninth Circuit (like the Second Circuit before it) disdained Congress's limitations on the scope of the whistleblower-protection provision and disregarded this Court's precedent. DRI and its members are committed to achieving workplaces free from unlawful retaliation. But not all retaliation claims have merit. The issue raised in this case can result in an almost limitless anti-retaliation provision. Defending against even facially unmeritorious retaliation claims imposes a significant expense on employers, and the Ninth and Second Circuits'

misinterpretation of Dodd-Frank's whistleblower-protection provision exacerbates this burden.

SUMMARY OF ARGUMENT

The Ninth Circuit, like the Second Circuit before it, held that respondent's Dodd-Frank whistleblower retaliation claims could survive a motion to dismiss even though it is undisputed that respondent is not a "whistleblower" as Dodd-Frank defines that term. The broadly expansive reinterpretation of the whistleblowers protected by Dodd-Frank exacerbates an ongoing and mature circuit split, see Pet. at 10–16. The Ninth Circuit's decision effectively moots the robust administrative remedies Congress provided whistleblowers like respondent who make internal complaints. And the decision increases the burden on employers by expanding the scope of a new anti-retaliation provision.

The Fifth Circuit and Second Circuit Judge Jacobs ably demonstrate that the plain meaning of Dodd-Frank's whistleblower-protection provision limits that statute's anti-retaliation provision to individuals who have actually provided information related to a securities violation to the SEC. *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 623–28 (5th Cir. 2013); *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 156–57 (2d Cir. 2015) (Jacobs, J. dissenting). Indeed, Congress's definition of "whistleblower" in 15 U.S.C. § 78u–6(a)(6) should resolve any perceived tension in the whistleblower-protection provision. See App. 4a, 25a, 26a, 30a, 32a.

The very incongruity of Congress creating a Dodd-Frank end run around the Sarbanes-Oxley Act's comprehensive administrative process reinfor-

ces this plain-meaning analysis of the text. Congress afforded individuals like respondent who make internal reports under Sarbanes-Oxley ample remedies including resort to litigation in federal district court *if the administrative remedies are exhausted*. Dodd-Frank does not require the exhaustion of administrative remedies and provides important benefits to plaintiffs that are unavailable under Sarbanes-Oxley. The Ninth Circuit's expansion of the scope of Dodd-Frank's whistleblower-protection provision thus effectively moots Sarbanes-Oxley's robust administrative-remedy regime for internal whistleblowers.

The Ninth Circuit's expansive reinterpretation of Dodd-Frank "whistleblowers" to include internal reports of fraudulent conduct also imposes an increasingly unmanageable and surprising burden on employers. Given that the internal reporting that the Ninth Circuit's reinterpretation protects includes any internal complaints that an employee *reasonably believes* address fraudulent activity under the federal mail- and wire-fraud statutes (themselves extremely broad), the scope of protected activity is staggeringly broad. Under the Ninth Circuit's ruling, employers must be concerned to avoid even the appearance of retaliation after receiving any internal employee complaint raising questions of dishonest gain. The Ninth Circuit's decision is all the more pernicious because most employers are unlikely to expect that a statutory provision that focuses on protecting employees who report information to the Securities and Exchange Commission is applicable to mundane internal reports, having nothing to do with securities laws.

The Ninth Circuit's decision is not only inconsistent with the text of Dodd-Frank itself. It also undermines the administrative remedies Congress enacted in Sarbanes-Oxley. There is nothing in the text or structure of Dodd-Frank that supports this result. Dodd-Frank focuses on reports to federal authorities, not internal complaints. Thus, only a whistleblower who actually provided information to the SEC can plead a claim for retaliation under Dodd-Frank. The Court should grant the petition and reverse the court of appeals.

ARGUMENT

The Court should grant certiorari to restore Congress's limits on the Dodd-Frank whistleblower-protection provision.

A. The Ninth Circuit's reinterpretation of Dodd-Frank effectively moots Sarbanes-Oxley's administrative remedies.

In Sarbanes-Oxley, Congress adopted a comprehensive administrative process to protect employees, contractors, and subcontractors of publicly traded companies who reported perceived securities violations and fraud to law enforcement, regulatory authorities, Congress, or even the employee's own supervisor. 18 U.S.C. § 1514A(a). This administrative-remedy regime is effectively rendered moot by the expansive reinterpretation of the Dodd-Frank whistleblower-protection provision adopted by the Second and Ninth Circuits. See *Asadi*, 720 F.3d at 629.

The Sarbanes-Oxley anti-retaliation provision requires employees to exhaust administrative

remedies before filing suit against employers. 18 U.S.C. § 1514A(b)(1). To initiate the administrative process, a person alleging retaliation for engaging in activity protected by Sarbanes-Oxley must file a complaint with the Secretary of Labor within 180 days of when the retaliation occurs or the person becomes aware of the retaliation. *Ibid.*; 18 U.S.C. § 1514A(b)(2)(D). The administrative process has three stages.

Initially, the Secretary of Labor makes a preliminary determination as to the merits of the complaint. The Secretary conducts an initial investigation giving the alleged offender and the employer (if the two are different) the opportunity to respond. The Secretary then makes a preliminary determination whether there is reasonable cause to conclude that the complaint has merit. *See* 18 U.S.C. § 1514A(b)(2)(A) (incorporating procedures in 49 U.S.C. § 42121(b)). If the Secretary determines the complaint has merit, the Secretary is required to order appropriate relief sufficient to make the employee whole, including reinstatement, back pay, special damages, and attorney fees. *Ibid.*; 18 U.S.C. § 1514A(c). If no party files a timely objection, the Secretary's preliminary determination becomes final and is not subject to judicial review. *Ibid.* (incorporating 49 U.S.C. § 42121(b)(2)(A)).

Next, the parties can obtain a determination by an administrative law judge. The complainant, the alleged offender, and the employer can obtain a hearing before an administrative law judge by filing objections to the Secretary's preliminary determinations within 30 days. 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(2)(A)). After

conducting a hearing, the administrative law judge is required to issue a decision containing "appropriate findings, conclusions, and as order pertaining to the remedies provided . . . as appropriate." 29 C.F.R. § 1980.109(a). If no party petitions for review to the Administrative Review Board, the administrative law judge's decision becomes the Secretary's final order and judicial review is barred. 29 C.F.R. § 1980.110(b).

The last step in the administrative process is potential review by the Administrative Review Board. Any party and the Labor Secretary can petition the Board to review the administrative law judge's decision. 29 C.F.R. § 1980.108, .110(a). The Board exercises discretionary jurisdiction. 29 C.F.R. § 1980.110(b). If the Board accepts a case for review, it generally issues a final decision within 134 days of the date of the administrative law judge's decision. 29 C.F.R. § 1980.110(c). The Board's decision becomes the final decision of the Secretary unless the Board declined to grant review, in which case the administrative law judge's decision becomes the Secretary's final order. 29 C.F.R. § 1980.110(b).

Congress authorized judicial review of a complainant's Sarbanes-Oxley retaliation claim in only two ways. A complainant aggrieved by the Secretary's final order may appeal to the United States Court of Appeals (assuming the appeal has been preserved). 18 U.S.C. § 1514A(b)(2)(A) (incorporating 49 U.S.C. § 42121(b)(4)(A)); 29 C.F.R. § 1980.112. Or a complainant may choose to file suit in the appropriate federal district court if the Secretary of Labor fails to issue a final decision within 180

days of the filing of the complaint. 18 U.S.C. § 1514A(b)(1)(B).

Dodd-Frank provides significantly greater potential benefits to whistleblowers than are afforded by Sarbanes-Oxley. First, Dodd-Frank's whistleblower-protection provision does not require a complainant to subject his or her claims to review by the Department of Labor and wait 180 days before filing suit. *See* 15 U.S.C. § 78u–6(h). Second, Dodd-Frank provides for greater monetary damages by authorizing the recovery of two times the amount of back pay otherwise owed. 15 U.S.C. § 78u–6(h)(C)(ii). Sarbanes-Oxley does not award double damages. 18 U.S.C. § 1514A(c). Third, the statute of limitations under Dodd-Frank is between 6 and 10 years, whereas Sarbanes-Oxley requires complaints to be filed within 180 days. Compare 15 U.S.C. § 78u–6(h)(1)(B)(iii) with 18 U.S.C. § 1514A(b)(2)(D). Accord *Asadi*, 720 F.3d at 629.

To be sure, Dodd-Frank and Sarbanes-Oxley do overlap with regard to individuals who provide information to the SEC or Congress. But this partial overlap likely contributed to the roughly 30% decline in the number of Sarbanes-Oxley retaliation complaints received by the Department of Labor in the years after Dodd-Frank was enacted.[2] The Second and Ninth Circuit's reinterpretation of Dodd-Frank's whistleblower-protection provision is likely to further depress the filing of Sarbanes-Oxley retaliation claims.

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[2] Department of Labor statistics available at http://tinyurl.com/SOX-retal-claims.

Thus, making the whistleblower protections of Dodd-Frank coterminous with the anti-retaliation provision in Sarbanes-Oxley effectively undermines Sarbanes-Oxley's robust administrative-remedy regime.

B. The expansive reinterpretation of Dodd-Frank creates an increased financial burden on employers.

The Ninth Circuit's expansive reinterpretation of Dodd-Frank's whistleblower-protection provisions strips employers of the benefit of an expedited, less costly administrative-resolution process for the exceedingly broad range of internal complaints that may be at issue. This increases the already nigh unmanageable burden imposed on employers, especially for small employers that contract or subcontract for public companies.

The primary focus of Dodd-Frank's whistleblower-protection provision is to protect individuals who provide information to the SEC and other governmental agencies. *Lawson* v. *FMR LLC*, 134 S. Ct. 158, 1175 & n.18 (2014). And it is relatively easy for an employer to enact workplace rules to prevent retaliation on this basis. Indeed, such activity is already protected in various states. See, e.g., Cal. Lab. Code § 1102.5; Mich. Comp. Laws § 15.361 et seq.; N.J. Stat. Ann. § 34:19, et seq.

But when a Dodd-Frank "whistleblower" includes any person who has engaged in activity protected by Sarbanes-Oxley, Dodd-Frank's prohibitions become exceedingly difficult to enact in the workplace. The scope of activity protected by Sarbanes-Oxley includes providing information to an employee's

supervisor that the employee reasonably believes constitutes fraudulent behavior under the federal mail, wire, banking, and securities fraud statutes. 18 U.S.C. § 1514A(a). These statutes "have 'been invoked to impose criminal penalties upon a staggeringly broad swath of behavior.' " *United States* v. *Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (quoting *Sorich* v. *United States*, 555 U.S. 1204, 129 S. Ct. 1308, 1308–11 (2009) (Scalia, J., dissenting from denial of certiorari)). The fraud statutes are "broad enough to include a wide variety of deceptions intended to deprive another of money or property." *United States* v. *Christopher*, 142 F.3d 46, 54 (1st Cir. 1998). Indeed, the scope of the fraudulent activities has perhaps most broadly been defined as being "measured by a nontechnical standard, condemning conduct which fails to conform to standards of moral uprightness, fundamental honesty, and fair play." *Atlas Pile Driving Co.* v. *DiCon Fin. Co.*, 886 F.2d 986, 991 (8th Cir. 1989).

Under Sarbanes-Oxley, because an employee need only report information to a supervisor that the employee *reasonably believes* to constitute a violation of the federal fraud statutes, the scope of protected activity is breathtaking. Consider an employer faced with an employee's report that another employee has been submitting—by email -inflated mileage reimbursement requests. The employer knows that the accusation is false, that the accuser is a poor performer, and that the accuser and the purported pilferer have an acrimonious relationship. Because Sarbanes-Oxley protection extends to internal reports of fraud, the employer cannot take any action that could be perceived as even an indirect threat against the accuser without risking a later

retaliation claim. Indeed, it is only slightly hyperbolic to suggest that a report of just about any dirty deed is protected activity.

To the extent that Sarbanes-Oxley protects internal reports so seemingly unrelated to any securities-law issue, Sarbanes-Oxley imposes that requirement most squarely on public companies. Public companies are more likely to be sophisticated enterprises with corporate compliance sections, human resources departments, and access to accounting and legal professionals. While no doubt imposing a significant burden to train supervisors to avoid taking any adverse action of any kind because an employee raised any complaint raising issues of honesty or integrity, at least public corporations can be expected to have the resources available to comply with the law.

But Sarbanes-Oxley applies more broadly to internal reports made by employees of public companies, private contractors and subcontractors. *Lawson*, 134 S. Ct. at 1161. Unlike most federal anti-retaliation provisions, Dodd-Frank and Sarbanes-Oxley do not contain a minimum size requirement (like Title VII, 42 U.S.C. § 2000e(e)) or a limitation to a specific regulated industry (e.g., the Federal Railroad Safety Act, 49 U.S.C. § 20109). Thus, Dodd-Frank and Sarbanes-Oxley apply to small employers without access to significant resources for corporate compliance, legal advice, and human resources. The Second and Ninth Circuit's expansion of Dodd-Frank imposes more significant compliance burdens (and the risk of double back-pay damages) on small employers that are the least likely to have any reason to expect that a statute

passed in the wake of the most-recent financial collapse contains an whistleblower-protection provision that is applicable to them.

The cost of resolving a retaliation claim is not insubstantial. Already twenty years ago, the costs of litigating a wrongful-discharge action were estimated to be $124,000. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 31–32 (1998). Indeed, the expense of litigating creates a significant pressure to settle even implausible retaliation claims. See Jessica K. Fink, *Protected by Association? The Supreme Court's Incomplete Approach to Defining the Scope of the Third-Party Retaliation Doctrine*, 63 Hastings L.J. 521, 545 (2012).

The effect of the Ninth Circuit's decision is to make the litigation costs unavoidable. Sarbanes-Oxley imposes these burdens on employers in the first instance, albeit with the requirements that the employee first pursue any retaliation claim with the Secretary of Labor and do so quickly. 18 U.S.C. § 1514A(b)(1). This process gives employers the benefit of screening unmeritorious claims and resolving many others in a far less expensive manner than litigation.[3] The Second and Ninth Circuit's decisions increase the burden on employers by effective depriving employees of this process and the requirement that employees assert their claims expeditiously.

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[3] Statistics available at http://tinyurl.com/SOX-retal-claims.

To what end? Congress's focus in adopting Dodd-Frank's whistleblower-protection provision was to protect individuals who report to the government. *Lawson* v. *FMR LLC*, 134 S. Ct. 1158, 1175 & n.18 (2014). Nor is there any hue and cry that the business community throughout the country is rife with fraudulent activity. The Second and Ninth Circuit's expansive reinterpretation of whistleblowers under Dodd-Frank serves no discernable purpose that counteracts the tremendous burdens imposed on employers remote from any possibility of securities fraud. Indeed, Sarbanes-Oxley already affords comprehensive remedies for purported whistleblowers like respondent who only make internal reports but with appropriate limitations. The Second and Ninth Circuits' misinterpretation of Dodd-Frank has significant negative ramifications for the nation's employers that should be reversed.

CONCLUSION

For the reasons given above, the Court should grant the petition for certiorari.

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John E. Cuttino
President
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe Street
Chicago, IL 60603
(312) 795-1101
jcuttino@gwblawfirm.com

Matthew T. Nelson
Counsel of Record
Conor B. Dugan
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John E. Cuttino
President
DRI–THE VOICE OF THE DEFENSE BAR
55 West Monroe Street
Chicago, IL 60603
(312) 795-1101
jcuttino@gwblawfirm.com

Matthew T. Nelson
Counsel of Record
Conor B. Dugan
WARNER NORCROSS & JUDD LLP
111 Lyon Street N.W.
900 Fifth Third Center
Grand Rapids, MI 49503
(616) 752-2539
mnelson@wnj.com

Counsel for Amicus Curiae

May 25, 2017